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No. 95-1796

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1995

THE REVEREND THOMAS L. BASICH, et. al.

Petitioners,

v.

BOARD OF PENSIONS, EVANGELICAL LUTHERAN CHURCH IN AMERICA (ELCA), a Minnesota non-profit corporation; EVANGELICAL LUTHERAN CHURCH IN AMERICA (ELCA), a Minnesota non-profit corporation,

Respondents.

On Petition For A Writ of Certiorari To The Minnesota Court of Appeals

RESPONDENT EVANGELICAL LUTHERAN CHURCH IN AMERICA'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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RULE 29.6 LIST

The Evangelical Lutheran Church in America ("ELCA" or "Church") is a Minnesota non-profit religious corporation which issues no stock. The Board of Pensions of the Evangelical Lutheran Church in America ("Board of Pensions") is a churchwide unit and a non-profit religious corporation designated by the Constitution, Bylaws and Continuing Resolutions of the ELCA with the responsibility to manage and operate the pension and other benefit plans for the Church.[1]

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[1] All, or at least the majority, of the members of the governing boards of the following non-profit corporations, which also issue no stock, are elected by the Evangelical Lutheran Church in America:

1. Board of Pensions of the Evangelical Lutheran Church in America;
2. Publishing House of the Evangelical Lutheran Church in America;
3. Mission Investment Fund of the Evangelical Lutheran Church in America;
4. National Lutheran Campus Ministry Inc.;
5. ELCA Risk Management Inc.;
6. ELCA University and College Health Inc.; and
7. Lutheran Medical Center.

TABLE OF CONTENTS

Page

RULE 29.6 LIST i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iv

OPINIONS BELOW 1

STATEMENT OF JURISDICTION 1

CONSTITUTIONAL PROVISIONS INVOLVED 1

STATEMENT OF THE CASE 3

SUMMARY OF ARGUMENT 11

ARGUMENT 12

I. THE JUDGMENT BELOW RESTS ON AN ADEQUATE AND INDEPENDENT STATE CONSTITUTIONAL LAW GROUND. 12

II. THE REMAINING FEDERAL QUESTIONS WERE NOT PRESSED OR PASSED ON BELOW, PRESENT NO SUBSTANTIAL FEDERAL QUESTION, AND INVOLVE NO CONFLICT AMONG LOWER COURTS. 14

CONCLUSION 17

APPENDIX

EXHIBIT A, MINNESOTA COURT OF APPEALS DECISION, *BASICH V. BOARD OF PENSIONS (ELCA)* A-1

EXHIBIT B, "APARTHEID: STATEMENTS AND ACTIONS OF THE AMERICAN LUTHERAN CHURCH DEALING WITH THE APARTHEID SYSTEM AND JUSTICE FOR ALL PEOPLES IN SOUTH AFRICA AND NAMIBIA: 1980-1985" B-1

TABLE OF AUTHORITIES

CASES

Page

Abood v. Detroit Board of Education, 431 U.S. 209 (1977) 16

Basich v. Board of Pensions, 493 N.W.2d 293 (Minn. App. 1992) 7

Basich v. Board of Pensions (ELCA), 540 N.W.2d 82 (Minn. App. 1995), *review denied*, (Minn. Jan. 25, 1996) 1

Corporation of Presiding Bishop v. Amos, 483 U.S. 327 (1987) 16

Geraci v. Eckancar, 526 N.W.2d 391 (Minn. App.), *review denied*, (Minn. Mar. 14, 1995), *cert. denied*, 116 S. Ct. 75 (1995) 9

Illinois v. Gates, 462 U.S. 213 (1983) 11, 14, 15

Jones v. Wolf, 443 U.S. 595 (1979) 8

McGowan v. Our Savior's Lutheran Church, 527 N.W.2d 830 (Minn. 1995) 7

Michigan v. Long, 463 U.S. 1032 (1983) 11, 13

Pruneyard Shopping Center v. Robins, 447 U.S. 74 (1980) 15

Saunders v. Shaw, 244 U.S. 317 (1917) 15

Serbian Eastern Orthodox Diocese v. Milivojevich, 426 U.S. 696 (1976) 8

State v. Hershberger, 462 N.W.2d 393 (Minn. 1990) .. 9, 13

STATUTES

28 U.S.C. § 1257(a) 1

CONSTITUTIONAL PROVISIONS

The Freedom of Conscience Clause, Article I, Section 16, of the Constitution of the State of Minnesota 1, 2, 7, 9, 11, 12, 13

The First Amendment of the United States Constitution 2, 6, 8, 11, 12, 13, 16

OTHER AUTHORITIES

Stern, Gressman, Shapiro & Geller, *Supreme Court Practice* (7th ed. 1993) 15

OPINIONS BELOW

The Minnesota Court of Appeals' decision is reported at *Basich v. Board of Pensions (ELCA)*, 540 N.W.2d 82 (Minn. App. 1995), a copy of which appears for the Court's convenience in Appendix A to this Brief (hereafter "App. A-").[2] The Supreme Court of Minnesota's denial of respondents' Petition for Review dated January 25, 1996, appears in Petitioners' Appendix (hereafter "Pet. App.") at Pet. App. A-1.

STATEMENT OF JURISDICTION

Petitioners seek a Writ of Certiorari pursuant to 28 U.S.C. § 1257(a). The decision below rests upon an independent and adequate state constitutional law ground. This Court therefore lacks jurisdiction to review the alternative federal law ground of decision. Moreover, the questions presented for review in the petition regarding the unconstitutionality of the Court of Appeals' decision were never presented to the Minnesota courts.

CONSTITUTIONAL PROVISIONS INVOLVED

The Freedom of Conscience Clause, Section 16, Article I

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[2] Petitioners submitted a version of the Court of Appeals' opinion which was erroneous in an important respect, *see* footnote 7.

of the Constitution of the State of Minnesota provides:

> The enumeration of rights in this constitution shall not deny or impair others retained by and inherent in the people. The right of every man to worship God according to the dictates of his own conscience shall never be infringed; nor shall any man be compelled to attend, erect or support any place of worship, or to maintain any religious or ecclesiastical ministry, against his consent; nor shall any control of or interference with the rights of conscience be permitted, or any preference be given by law to any religious establishment or mode of worship; but the liberty of conscience hereby secured shall not be so construed as to excuse acts of licentiousness, or justify practices inconsistent with the peace or safety of the State, nor shall any money be drawn from the treasury for the benefit of any religious societies or religious or theological seminaries.

The First Amendment of the United States Constitution provides:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

STATEMENT OF THE CASE

This lawsuit arose out of a controversy between a small group of Lutheran pastors and their denomination's governing authorities over the proper Christian response of the ELCA to the ongoing sin of apartheid in South Africa. The ELCA is the largest Lutheran denominational body in the United States, with over 11,000 congregations, more than five million members, and over 17,000 ordained ministers. The ELCA was formed by the 1988 merger of three Lutheran denominations, The American Lutheran Church (ALC), the Lutheran Church in America (LCA) and the Association of Evangelical Lutheran Churches (AELC).

The ELCA is organized in accordance with its Constitutions, Bylaws, and Continuing Resolutions into congregations, synods, and churchwide organizations. Each synod elects representatives to the Churchwide Assembly, which is the highest legislative and ecclesiastical authority of the Church and is responsible for establishing churchwide policy. A-218 - A-219 below. (Citations of the form "A-___ below" are to the Appendix of the ELCA submitted to the Minnesota Court of Appeals.)

The Board of Pensions is a churchwide unit which, pursuant to the ELCA Constitution, is organized as a separate corporation with responsibility for the management and operation of the Pension and Other Benefit Plans of the ELCA. The pension investments administered by the Board of Pensions are managed pursuant to documents approved by the ELCA. These documents include, among others, the ELCA

Constitution, Bylaws and Continuing Resolutions, the Articles of Incorporation of the Board of Pensions, the Regular Pension Plan and the Regular Pension Trust. The Restated Articles of Incorporation of the Board of Pensions of the ELCA provide:

> [t]his corporation is organized and shall be operated exclusively for religious purposes and exclusively for the benefit of and to assist in carrying out the purposes of the Evangelical Lutheran Church in America (the 'ELCA'), a Minnesota non-profit corporation.

Appendix of Appellant Board of Pensions, ELCA, Volume I, BOP-32 - BOP-33 below. The Trust Document governing management of the pension funds involved herein provides that the trust is

> formed exclusively for religious and charitable purposes and in connection therewith exclusively for the benefit of, and to assist in carrying out the purposes of, the Evangelical Lutheran Church in America.

Appendix of Appellant Board of Pensions, ELCA, Volume II, BOP-507 below.

The ELCA pursued a policy of gradual divestment of all church funds, including pension funds, in South African investments, pursuant to the Church's religious convictions as determined and expressed by the Churchwide Assembly. The Lutheran churches' vigorous opposition on religious grounds to apartheid in South Africa dates back to the 1970's. In 1977, the

Lutheran World Federation (of which the ALC and LCA were members and the ELCA is now a member), meeting in Dar es Salaam, Tanzania, declared apartheid to be

> so oppressive and so contrary to the Lutheran understanding of the unity of believers in Christ and the equality of the entire human family that it must be rejected *as a matter of the faith itself.*

App. B-2 (emphasis added). The Dar es Salaam Assembly declared opposition to apartheid to be a matter of "*status confessionis*," that is, a foundational "confession" or principle of the Lutheran Church. Vigorous opposition to and commitment to work to end apartheid thus became a critical article of faith of the Lutheran Church, world-wide, and one of the defining social principles of the Lutheran World Federation and the ELCA.[3]

Shortly after the Dar es Salaam Assembly, The American Lutheran Church (ALC) passed resolutions declaring opposition to apartheid to be a matter of *status confessionis* and declaring its commitment to divestiture as "the most legitimate strategy in opposing apartheid and the most effective consequence of a declaration of 'status confessionis.'" A-155b below. The Lutheran Church in America (LCA) adopted similar goals, noting that

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[3] The Confessing Church in Germany adopted a similar posture of *status confessionis* with respect to opposition to the Nazi regime in Germany, and to its attempt to bring Lutheran churches in Germany under the control of the Nazi state. Opposition to Naziism and opposition to apartheid are the only two modern instances in which Lutherans have made such a stand a matter of *status confessionis*. App. B-2 - B-3.

> the ethical investor may feel morally obligated to disassociate him or herself from the injury [caused by certain social systems] by disinvestment. This is not done in the vain pursuit of moral "purity," nor in the expectation that the corporation will change its practice as a consequence, but rather in the recognition that there are moral limits beyond which one ought not to go in seeking profitable investment opportunities.

A-161 below.

At the Constituting Convention of the ELCA in 1987, the merging denominations joined in a united resolution reciting and reaffirming their continuing opposition "to the sin of apartheid," and pledging that the ELCA would "work tirelessly to see that none of our ELCA Pension Funds will be invested in companies doing business in South Africa." A-242 below. In 1988, in response to the actions of the ELCA, the Board of Pensions adopted a policy which sought to implement the Church's desire to avoid South African investments.

Petitioners are a small group of dissenting pastors who brought suit in Minnesota state court seeking to invalidate the Church's policy of gradual divestment based on religious principles on the theory that the Church's policy constituted a breach of an implied contract concerning how Church pension

funds would be managed.[4] The petitioners specifically argued below that "[t]he 'church's' position on apartheid is not a Christian doctrine." *See* Respondents' Memorandum of Law in Support of the Motion to Dismiss Appellants' Appeal below, p. 6 (emphasis in original).

Respondent ELCA and its Board of Pensions moved for summary judgment on the grounds, *inter alia*, that the First Amendment religion clauses and, separately, the Freedom of Conscience provisions contained in Article I, Section 16 of the Minnesota Constitution, barred relief because resolution of the petitioners' claims would require adjudication of matters of Church religious doctrine, discipline, polity and governance. The trial court denied the Church's motion for summary judgment. Pet. App. F-2. Under Minnesota law, these defenses are treated as jurisdictional, permitting immediate appellate review. *McGowan v. Our Savior's Lutheran Church*, 527 N.W.2d 830, 833 (Minn. 1995); *see* Pet. App. C-2 (Court of Appeals' Order denying motion to dismiss appeal).

The Minnesota Court of Appeals unanimously reversed the trial court, sustaining respondents' federal and state religious liberty defenses and directing that the amended complaint be dismissed. The Court of Appeals' decision rested on two distinct grounds. First, the court concluded that adjudication of the dissenting pastors' claims would violate the religion clauses

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[4] This litigation is one of a succession of suits brought by the same ELCA pastors against the Church. A prior lawsuit seeking injunctive relief based on the same facts but a different legal theory was dismissed. *See Basich v. Board of Pensions*, 493 N.W.2d 293 (Minn. App. 1992).

of the First Amendment.[5] The court found that the ELCA's Board of Pensions existed "to both provide for pastors' retirement needs and assist the ELCA in accomplishing doctrinal goals." App. A-9 (emphasis in original). The court further held that opposition to apartheid was part of ELCA church doctrine, and that, consequently, "review of the Board of Pensions' divestment and equivalency policies would entangle the court in reviewing church doctrine and policy." *Id.* Additionally, the court held, a trial court "would be required to examine church doctrine and organization to determine whether a breach of contract occurred in this case," since the documents alleged to create the "contract" between the pastors and the Church embraced religious concepts and referenced the religious policies and aims of the Church. *Id.*

The court also dismissed petitioners' contention that the matter could be resolved on neutral principles of contract and trust law.

> The flaw in this contention is illustrated by the Pastors' admission that the ELCA could properly prohibit investments by the Board of Pensions in morally obnoxious commercial activity such as prostitution or pornography. There are no neutral principles of law that would enable a district court to distinguish between

[5] The court framed its analysis in terms of the Establishment Clause, but relied on the "church autonomy" line of cases of this Court, decided under the religion clauses taken as a whole. *See* App. A-7 - A-8 (applying *Jones v. Wolf*, 443 U.S. 595 (1979) and *Serbian Eastern Orthodox Diocese v. Milivojevich*, 426 U.S. 696 (1976)).

> investments that Lutheran doctrine should find to be morally acceptable and those that it should find to be morally unacceptable.

App. A-9 - A-10.

The Minnesota Court of Appeals then, in a separate Section II of its opinion, turned to the Minnesota Constitution's religious liberty provisions, Article I, Section 16. The court noted that "[t]he Freedom of Conscience Clause affords greater protection for religious liberties against governmental action than the federal constitution." App. A-10 - A-11 (citing *State v. Hershberger*, 462 N.W.2d 393, 397 (Minn. 1990)). The court applied the four-part test developed by the Minnesota Supreme Court for analyzing Freedom of Conscience Clause claims under the Minnesota Constitution, and found that "allowing the district court's review of this matter would violate the Freedom of Conscience Clause." App. A-11 - A-12. The court remarked that "[i]f the civil courts were allowed to rescind pension plan contracts every time a group of dissenting participants disagreed with the Board of Pensions' social or moral investment strategies, the ELCA's ability to express its faith through social and moral investment would be substantially compromised." App. A-12.

Finally, the court, citing *Geraci v. Eckancar*, 526 N.W.2d 391 (Minn. App.), *review denied*, (Minn. Mar. 14, 1995), *cert. denied*, 116 S. Ct. 75 (1995) stated that, "to review this case, the district court would be required to question the ELCA's basis for a decision that it contends was founded in Lutheran doctrine." *Id.* The court concluded that judicial inquiry into church doctrine is itself a substantial burden and that a review of this case by the District Court would burden the

ELCA's exercise of religious belief. *Id.*

Petitioners sought review of the Minnesota Court of Appeals' decision by the Minnesota Supreme Court. The petition for review in that court raised the questions of the correctness of the Court of Appeals' decision on the federal religious freedom issue and the correctness of the decision on the state constitutional issue, as a matter of state law. The petition did not raise any question concerning whether the Court of Appeals' decision affirmatively violated the due process, equal protection or free speech clauses of the U.S. Constitution. The Minnesota Supreme Court denied review. Pet. App. A-1.[6]

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[6] Pursuant to Rule 15.2 of this Court, we point out the following misstatements of fact in the Petition. First, Petitioners contend (Pet. 8) that "the Plan suffered underperformance losses of more than $227 million between 1988 and 1991." No such fact was found by any lower court. This allegation is based entirely on the affidavit of one of the petitioners, using only his personal "preliminary estimates" which misleadingly omitted critical data and which failed to ascertain causation of any alleged "losses." Respondents challenged the validity of this affidavit, but the courts below did not find it necessary to rule on this issue, because respondents' state and federal constitutional objections were held to require dismissal of the complaint, rendering the accuracy of the affidavit irrelevant.

Second, Petitioners imply that the ELCA and its predecessor denominations managed pension funds "solely on the basis of traditional considerations of profit maximization" up to 1988. Pet. 8. This is not true. The record is clear that the ELCA and its predecessor denominations traditionally have taken moral concerns into account in making investment decisions, including specifically with respect to South African divestment as early as 1981 by the ALC. A-144 below. *See also* deposition testimony of one of the petitioners ("[i]t's my understanding that -- that the Board of Pensions of LCA tended to avoid the purchase of companies that produced liquor." A-283 below); Minutes of the Eleventh Biennial Convention of the LCA (1982):

> That there are, or may be moral limits beyond which the

(continued...)

SUMMARY OF ARGUMENT

The Minnesota Court of Appeals rested its judgment on two independent grounds: (i) the religion clauses of the First Amendment; and (ii) the Freedom of Conscience Clause in Article I Section 16 of the Minnesota Constitution. The decision below thus rests on an independent state law ground adequate to support the judgment. *Michigan v. Long*, 463 U.S. 1032 (1983). The Petition for Certiorari presents no substantial federal question as to the validity of that state law ruling. Indeed, the federal law challenge to the validity of the state constitutional holding was not presented in the petition for review before the Minnesota Supreme Court, and thus involves questions "not pressed or passed on below." *Illinois v. Gates*, 462 U.S. 213, 217-224 (1983).

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[6](...continued)
> church and its agencies ought not to go in seeking investment opportunity, seems generally accepted among North American Christians, although there is little or no consensus as to what those limits might be. This church has followed the generally accepted practice within American Protestantism on refraining from investing in liquor or tobacco companies, presumably on the assumption that these products are harmful even though the moderate use of them has been traditionally accepted in Lutheran circles.

Reply Brief and Appendix of Appellant ELCA below, RA-28. The Minnesota Court of Appeals' opinion found that the Petitioners' had "admi[tted] that the ELCA could properly prohibit investments by the Board of Pensions in morally obnoxious commercial activity." App. A-9.

There is no conflict among the decisions of lower federal or state courts on the questions presented. Nor does this case present any issue of continuing or recurring significance. The facts involve the unique context of the Evangelical Lutheran Church in America's policy of gradual divestment of South African investment holdings between the years 1987-1993, as an act of spiritual conscience directed at the government of South Africa at that time. The factual situation that gave rise to this dispute has ended and no similar cases are pending before any other court in the United States.

ARGUMENT

I. THE JUDGMENT BELOW RESTS ON AN ADEQUATE AND INDEPENDENT STATE CONSTITUTIONAL LAW GROUND.

The first question presented by petitioners, whether the Minnesota Court of Appeals correctly found that the First Amendment bars adjudication of the issues raised in the complaint, is not properly before this Court because the decision below rests independently on a state law ground that fully supports the judgment. The Minnesota Court of Appeals could scarcely have been more explicit in setting forth the Article I, Section 16 Freedom of Conscience Clause ground as a separate and independent basis for ruling in favor of respondents. *See* App. A-10 - A-13 (analyzing this issue separately from the federal law issue, and applying cases decided on this state law

constitutional ground).[7] This Court, of course, has no jurisdiction to review that state law holding. It therefore has no jurisdiction to review the judgment, because the state law ground was sufficient for the Minnesota Court of Appeals' holding. *Michigan v. Long*, 463 U.S. 1032 (1983).

This case falls within none of the exceptions to the rule that this Court lacks jurisdiction to review judgments of state court systems that rest on an independent and adequate state law ground. There is no question of the "adequacy" of the state law ground to support the judgment. The Minnesota Court of Appeals held that the Minnesota Constitution requires that the complaint be dismissed. No federal law determination at all is necessary to support this judgment. Nor is there any question of the "independence" of the state law ground. The state court's opinion does not cite the federal Constitution, or even any federal law case, in support of its state law holding. The court cited only Minnesota state cases interpreting the Minnesota Constitution. Indeed, the leading state case relied on, *State v. Hershberger*, explicitly distinguishes Minnesota's interpretation of its own religious liberty clauses from this Court's interpretation of the First Amendment religion clauses. *Hershberger*, 462 N.W.2d at 397-99.

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[7] To emphasize the separateness of the First Amendment analysis from the Minnesota Constitution Freedom of Conscience analysis, the Court divided their decision into two distinct sections, identified as "**I**" (containing the First Amendment analysis) and "**II**" (containing the Freedom of Conscience analysis). The Roman Numerals were omitted in the copy of the case presented to this Court in Pet. App. B by Petitioners (compare App. A-6 and App. A-10 to Pet. App. B-6 and Pet. App. B-9).

> Whereas the first amendment establishes a limit on government action at the point of prohibiting the exercise of religion, section 16 precludes even an infringement on or an interference with religious freedom. Accordingly, government actions that may not constitute an outright prohibition on religious practices (thus not violating the first amendment) could nonetheless infringe on or interfere with those practices, violating the Minnesota Constitution.

Id. (emphasis in original). There is thus no issue of a state constitutional ground being tied to an interpretation of an analogous provision of the U.S. Constitution. *Cf. Michigan v. Long*, 463 U.S. at 1043-44.

II. THE REMAINING FEDERAL QUESTIONS WERE NOT PRESSED OR PASSED ON BELOW, PRESENT NO SUBSTANTIAL FEDERAL QUESTION, AND INVOLVE NO CONFLICT AMONG LOWER COURTS.

The petition for certiorari raises -- for the first time in this case -- a series of assertions that dismissal of the petitioners' claims on state constitutional grounds would somehow violate the federal constitution. These contentions were not presented in the petition for review to the Minnesota Supreme Court. They should be deemed waived, under the rule that this Court generally will not consider questions "not pressed or passed

upon below." *Illinois v. Gates*, 462 U.S. at 222.

This is not a case where a state court of last resort has issued a "surprise" decision in which a federal issue is born out of a state law holding and the state court of last resort thereafter declines to entertain a petition for rehearing on the issue, leaving a litigant with no recourse but to raise it for the first time in a petition for certiorari addressed to this Court. *See* Stern, Gressman, Shapiro & Geller, *Supreme Court Practice* 130 (7th ed. 1993) (citing *Saunders v. Shaw*, 244 U.S. 317, 320 (1917)). *See also Pruneyard Shopping Center v. Robins*, 447 U.S. 74, 85-86 n.9 (1980). Here, the putative federal constitutional challenge to the state constitutional holding was clearly presented (at the latest) by the Court of Appeals' decision. The court's state-law holding was not challenged on federal constitutional grounds in the Minnesota Supreme Court. Under *Illinois v. Gates*, it should not be open to petitioners to raise such challenges for the first time in the petition for certiorari.

In any event, petitioners' claimed federal law challenges to the Minnesota Court of Appeal's state constitutional holding are insubstantial. First, petitioners claim that the Minnesota law holding violates federal due process by "depriv[ing] Petitioners of a civil forum to protect their rights." Pet. 16. This claim is meritless. The Minnesota courts did not deprive petitioners of a *forum* for hearing their claims; they merely held that petitioners *lost* on their claims as a matter of state law -- that is, that respondents had a valid state law defense that barred relief on the theories asserted. No due process issue is presented by that holding.

Second, petitioners claim that the holding below violates the federal equal protection clause because it treats religious "contracts" differently from purely secular contracts. Pet. 18.

It is true that the holding below finds a state constitutional liberty for churches that does not exist for non-religious organizations. But this does not violate "equal protection," unless all accommodations of religion not required by the federal free exercise clause also violate equal protection. This is plainly not the case. *See, e.g., Corporation of Presiding Bishop v. Amos*, 483 U.S. 327, 334 (1987). Indeed, under petitioners' argument, any state constitutional provision that conferred rights broader than the federal constitution recognizes would be subject to "strict scrutiny" under the equal protection clause. Such an extravagant claim finds no support in any decision of this Court.

Third, petitioners assert that the state court's decision violates the free speech clause of the First Amendment, by "forcing an individual to contribute money to a political purpose in which the individual does not believe." Pet. 18-19 (citing *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977)). This too is a novel claim. No court has ever found a federal free speech right of individuals to interfere with the collective free exercise rights of *private* religious groups of which they are members. This case is a far cry from a state law requiring that individuals contribute money to a labor union's political activities. *Abood*, 431 U.S. 209. Here, no one has compelled petitioners to contribute money for political purposes, in the sense in which *Abood* employs that concept. Certainly the State of Minnesota has engaged in no such compulsion. Rather, the Court of Appeals simply held that the state constitution does not permit an individual to compel a court affirmatively to intervene in a church's management of pension assets established for religious purposes and pursuant to relationships created under church authority, doctrine, and governance.

Petitioners can point to no conflict among lower courts -- state or federal -- on any of these questions. Indeed, petitioners point to no other lower court cases involving the same issues. As noted above, the controversy within the ELCA over divestment of South African holdings is now a thing of the past. The facts of this case involve a Lutheran Church policy, undertaken between the years 1987 and 1993, and addressed to a unique historical situation. The factual situation that gave rise to this dispute has ended and (as far as we are aware) there are no similar cases pending before any other court in the United States.

The petition raises no substantial federal question, no conflict among lower courts, and no issue of continuing or ongoing significance.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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STATE OF MINNESOTA
IN COURT OF APPEALS
C8-95-882
CX-95-883

Hennepin County District Court File No. 9316711	Kalitowski, Judge
The Reverend Thomas L. Basich, et al., Respondents,	Robert C. Bell Peterson, Bell, Converse & Jensen 310 Rosedale Towers 1700 West Highway 36 Roseville, MN 55113
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Office of Appellate Courts

SYLLABUS

The Establishment Clause of the First Amendment and the Freedom of Conscience Clause of the Minnesota Constitution deprive the district court of subject matter jurisdiction over a breach of contract action where respondent pastors allege that the Evangelical Lutheran Church of America wrongfully directed the church's board of pensions to invest pursuant to social and moral concerns rather than solely in the pastors' best financial interest.

Reversed.

Considered and decided by Kalitowski, Presiding Judge, Huspeni, Judge, and Davies, Judge.

OPINION

KALITOWSKI, Judge

Respondents, several Lutheran pastors, a lay employee and a Lutheran congregation (Pastors), filed this individual action for breach of contract and breach of fiduciary duty against appellants, the Evangelical Lutheran Church of America (ELCA) and the Board of Pensions of the Evangelical Lutheran Church of America (Board of Pensions). The ELCA and the Board of Pensions moved for summary judgment on the grounds that the First Amendment of the United States Constitution and the Freedom of Conscience Clause of the Minnesota Constitution deprive the court of subject matter jurisdiction in this dispute.

The district court denied the motion.

FACTS

The Pastors participate in defined contribution pension accounts, contributed to by their congregations and administered by the Board of Pensions. The Pastors allege that the Board of Pensions has mismanaged funds by investing and divesting pursuant to social concerns rather than solely in the economic best interests of the plan participants.

The ELCA and the Board of Pensions are organized as Minnesota nonprofit corporations. The ELCA is comprised of 65 Synods governing 11,000 congregations. Each Synod elects representatives to the Churchwide Assembly, the highest legislative authority in the ELCA. When the Churchwide Assembly is not in session, the ELCA is governed by the Church Council. The Board of Pensions was established by the ELCA in 1988 to provide retirement income and benefits to Lutheran pastors and lay church employees. The ELCA Constitution provides that the Board of Pensions is to manage and operate the pension fund with the "design and policy adopted by the Churchwide Assembly." The Board of Pension's Articles of Incorporation provide that the Board is

> organized and shall be operated exclusively for religious purposes and exclusively for the benefit of and to assist in carrying out the purposes of the ELCA.

The ELCA Churchwide Assembly and Council have final

authority and control over policies implemented by the Board of Pensions.

In 1977 the Lutheran World Federation Assembly declared that apartheid was so contrary to the Lutheran understanding of believers in Christ that it must be rejected as a matter of faith itself. The ELCA expressed its opposition to apartheid by passing a resolution to "see that none of our ELCA pension funds will be invested in companies doing business in South Africa." The Board of Pensions responded in 1988 by adopting the "equivalency policy," whereby the Board of Pensions agreed to divest (and refrain from making new investments) in companies with South African holdings whenever the conditions of risk and return were equal between stocks and bonds held by the Board. The equivalency policy governed investment decisions until its repeal in 1993.

A dissenting group of Lutherans led by respondent Reverend Thomas Basich disagreed with the Churchwide Assembly's divestment policy. Basich and others published articles opposing the ELCA's decision to use its assets as a political weapon and condemning the Board of Pensions for "acquiescing" to the Churchwide Assembly's pressure on the issue of apartheid. Basich requested that he and others be allowed to withdraw their pension funds. The Board of Pensions denied this request. In response, Basich and others filed a derivative action suit against the Board of Pensions. This court held the Pastors did not have standing to bring a derivative suit. Basich v. Board of Pensions of Evangelical Lutheran Church in Am., 493 N.W.2d 293, 296 (Minn. App. 1992). The Pastors then filed this action for individual relief on the grounds of breach of contract and breach of fiduciary duty.

ISSUES

1. Does the First Amendment of the United States Constitution prevent the district court from exercising jurisdiction over this dispute?
2. Does the Freedom of Conscience Clause of the Minnesota Constitution prevent the district court from exercising jurisdiction over this dispute?

ANALYSIS

A motion for summary judgment shall be granted when there is no issue of material fact and a party is entitled to judgment as a matter of law. Fabio v. Bellomo, 504 N.W.2d 758, 761 (Minn. 1993). None of the facts relevant to a determination of this summary judgment motion are disputed. The only remaining issue, therefore, is whether the federal or state constitution deprives the court of subject matter jurisdiction of the Pastors' claim. This issue is a question of law. A reviewing court is not bound by and need not give deference to a trial court's decision on a purely legal issue. Frost-Benco Elec. Ass'n v. Minnesota Pub. Utils. Comm'n, 358 N.W.2d 639, 642 (Minn. 1984).

I.

The ELCA and the Board of Pensions allege that the First Amendment to the United States Constitution deprives the district court of subject matter jurisdiction. The First Amendment provides that

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof * * *.

U.S. Const. amend. I. The Establishment Clause cannot easily be reduced to a single test. Rosenberger v. Rector & Visitors of the Univ. of Va., 115 S. Ct. 2510, 2528 (1995). The Supreme Court has held that for an exercise of governmental authority to be valid under the Establishment Clause, it must: (1) have a secular purpose; (2) neither inhibit nor advance religion as its primary effect; and (3) not create excessive entanglement between church and state. Lemon v. Kutzman, 403 U.S. 602, 612-13, 91 S. Ct. 2105, 2111 (1971). The Supreme Court has also applied the "principles of neutrality" test, requiring that civil courts hear only disputes which can be determined on the basis of neutral principles of law. Jones v. Wolf, 443 U.S. 595, 602, 99 S. Ct. 3020, 3025 (1979).

Applying the Lemon factors, the parties do not allege that Minnesota contract and trust law lacks a secular purpose or that its primary effect inhibits or advances religion. Therefore, we need only consider whether review of this dispute would cause excessive entanglement between church and state and whether, under Jones, this dispute can be resolved by neutral principles of law.

Whether government action causes excessive entanglement depends on the nature of the intrusion into religious administration, the character and purpose of the involved institutions and the resulting relationship between the religious authority and government. Lemon, 403 U.S. at 614-15, 91 S. Ct. at 2112. If a claim involves core issues of ecclesiastical concern, the potential for government entanglement in religious

matters prevents judicial review. Serbian Eastern Orthodox Diocese v. Milivojevich, 426 U.S. 696, 721-23, 96 S. Ct. 2372, 2386-87 (1976).

This court has held that the Establishment Clause prevents civil courts of Minnesota from considering a breach of contract claim brought by a pastor against her former church. Black v. Snyder, 471 N.W.2d 715, 720 (Minn. App. 1991), review denied (Minn. Aug. 29, 1991). In Black, a Lutheran associate pastor filed a discrimination charge against her supervising pastor alleging sexual harassment. Id. at 717-18. Shortly thereafter, the congregation voted to discharge Black and Black sued the church for, among other claims, breach of contract. Id. at 718. This court held that hearing Black's breach of contract claim would cause excessive entanglement because it would require the court to examine issues of church doctrine and governance and would require court review of the church's motives. Id. at 720.

This court has also refused to hear a defamation case to avoid excessive entanglement under the Establishment Clause. Schoenhals v. Mains, 504 N.W.2d 233, 236 (Minn. App. 1993). The Schoenhals alleged that their pastor defamed them by communicating to the congregation that they had been poor parishioners. Id. at 234-35. The pastor alleged that his statements were based in the Bible and in the church's religious beliefs and practices. Id. at 235. This court found that while the pastor's statement appeared unrelated to church doctrine, court review of the defamatory statements would require an inquiry into the church's motives and disciplinary matters. Id. at 236. Accordingly, this court found that to prevent excessive entanglement, the district court must not hear the case. Id.

The Pastors argue that a review of this case will not require the court to entangle itself in issues of Lutheran doctrine. We disagree. Delegates to the Churchwide Assembly, the highest legislative authority of the Lutheran church, voted to divest funds from companies with holdings in South Africa and directed the Board of Pensions to implement the divestment policy. While the Board of Pensions is required to prudently invest its holdings, the ELCA created the Board to both provide for pastors' retirement needs and assist the ELCA in accomplishing doctrinal goals. The ELCA enacted the equivalency policy in an effort to further its social and doctrinal goals of opposing apartheid. Accordingly, any review of the Board of Pensions' divestment and equivalency policies would entangle the court in reviewing church doctrine and policy.

In addition, the district court would be required to examine church doctrine and organization to determine whether a breach of contract occurred in this case. The plan document is the primary "contract" between the parties. It provides that the Board of Pensions shall discharge its duties with the care that a prudent person would use in the conduct of an enterprise of like character with like aims. Thus, the district court would be required to examine the ELCA's "aims" before it could determine the breach of contract issue. Such inquiry into church motives is forbidden by the Establishment Clause of the United States Constitution.

The Pastors also contend that this case can be resolved on neutral principles of contract and trust law. We disagree. The flaw in this contention is illustrated by the Pastors' admission that the ELCA could properly prohibit investments by the Board of Pensions in morally obnoxious commercial activity such as

prostitution or pornography. There are no neutral principles of law that would enable a district court to distinguish between investments that Lutheran doctrine should find to be morally acceptable and those that it should find to be morally unacceptable. We conclude that the Establishment Clause of the First Amendment deprives the district court of subject matter jurisdiction in this dispute because review of this issue would require the district court to look beyond neutral principles of contract and trust law and entangle itself in issues of church doctrine.

II.

The ELCA and the Board of Pensions allege that the Freedom of Conscience Clause of the Minnesota Constitution deprives the district court of subject matter jurisdiction. Article I, section 16 of the Minnesota Constitution provides that

> [t]he right of every man to worship God according to the dictates of his own conscience shall never be infringed * * * nor shall any control of or interference with the rights of conscience be permitted, or any preference be given by law to any religious establishment or mode of worship; but the liberty of conscience hereby secured shall not be so construed as to excuse acts of licentiousness or justify practices inconsistent with the peace or safety of the state * * *

The Freedom of Conscience Clause affords greater protection for religious liberties against government action than the federal

constitution. State v. Hershberger, 462 N.W.2d 393, 397 (Minn. 1990). In determining whether government action violates the Freedom of Conscience Clause, Minnesota courts consider whether: (1) the objector's belief is sincerely held; (2) the action burdens the exercise of religious beliefs; (3) the state's interest is compelling; and (4) the state action uses the least restrictive means. Hill-Murray Fed'n of Teachers v. Hill-Murray High Sch., 487 N.W.2d 857, 865 (Minn. 1992). Under the Freedom of Conscience Clause, only governmental interests in "peace or safety" and against "acts of licentiousness" will excuse government imposition on religious freedom. Hershberger, 462 N.W.2d at 397.

This court has applied the Freedom of Conscience Clause recently to a discrimination claim brought by a lay church employee against the Eckankar church. Geraci v. Eckankar, 526 N.W.2d 391 (Minn. App. 1995), review denied (Minn. Mar. 14, 1995), cert. denied, 116 S. Ct. 75 (1995). Carol Geraci was a computer programmer for the Eckankar church who claimed that the church discriminated against her on the basis of gender. Id. at 395. The church alleged that Geraci was terminated for failing to work harmoniously with her coworkers in disregard of the sacred teachings of Eckankar. Id. This court concluded that while the state's interest in eradicating discrimination is compelling, it could not question Eckankar's basis for decisions claimed to be doctrinally related because to do so may compel the church to conform its religious beliefs with the government's or with the majority culture's beliefs. Id. at 399.

An analysis of the four elements of the Freedom of Conscience Clause test leads us to conclude that allowing the district court's review of this matter would violate the Freedom

of Conscience Clause. First, there is no question that the ELCA acted pursuant to a sincerely held religious belief by enacting the equivalency policy. The Lutheran World Federation declared that apartheid must be rejected as a matter of the Lutheran faith itself. Similarly, the Constituting Convention of the ELCA passed a resolution stating that divestment was the appropriate response to the "sin of apartheid."

Second, review of this case would burden the exercise of the ELCA's religious beliefs. If the civil courts were allowed to rescind pension plan contracts every time a group of dissenting participants disagreed with the Board of Pensions' social or moral investment strategies, the ELCA's ability to express its faith through social and moral investment would be substantially compromised. Additionally, as in Geraci, to review this case, the district court would be required to question the ELCA's basis for a decision that it contends was founded in Lutheran doctrine. Judicial inquiry into issues of church doctrine is itself a substantial burden. Id. Accordingly, a review of this case would burden the ELCA's exercise of religious beliefs.

Third, the government does not have a compelling interest in reviewing this case. The Pastors argue that there is an important governmental interest in providing a forum for review of this matter. We disagree. The forum best suited to review the Pastors' grievance is the Churchwide Assembly. The delegates to the Churchwide Assembly debated the appropriateness of the equivalency policy at length. As the highest legislative authority in the ELCA, the Churchwide Assembly's determination on this issue is final. The civil courts need not hear this case to ensure public "peace or safety" and the Pastors' breach of contract action does not allege an act of "licentiousness," as required by

the Minnesota Freedom of Conscience Clause.

Because the Pastors have not alleged a compelling governmental interest in hearing this dispute, we need not address the fourth element of the Freedom of Conscience Clause test. We conclude that a review of this case would substantially burden the ELCA's exercise of religion. Therefore, the Freedom of Conscience Clause of the Minnesota Constitution deprives the district court of subject matter jurisdiction in this dispute.

DECISION

The district court erred in denying appellants' motion for summary judgment on the grounds that the court did not have subject matter jurisdiction. The district court's decision is reversed and this matter is dismissed pursuant to the Establishment Clause of the First Amendment and the Freedom of Conscience Clause of the Minnesota Constitution.

Reversed.

s/Thomas Kalitowski
11-17-95

APARTHEID

Statements and actions of The American Lutheran Church dealing with the apartheid system and justice for all peoples in South Africa and Namibia: 1980-1985

- "Goals for Combating Apartheid" (1985)
- "Goals for Combating Apartheid" (1981)
- "Apartheid in South Africa — Is It Any of Our Business?" (1981)
- "Human Rights of the People of Namibia" (1980)
- "Opposition to Apartheid" (1980)

[ALC Logo]

- "South Africa — Divestment" (1981)

I. Goals for Combating Apartheid (1985)

* * *

2. "STATUS CONFESSIONIS"

The American Lutheran Church has declared its opposition to the apartheid system in the strongest of terms. Its 1980 General Convention voted unanimously to "express its unequivocal rejection of apartheid and all other forms of racial discrimination in our own society as well as in other nations, and [to] declare apartheid to be a matter of 'status confessionis.'"

The term means "a state of confession." It was applied to the situation of Lutheran churches in southern Africa, White and Black, by the Sixth Assembly of the Lutheran World Federation, meeting in Tanzania in June 1977. That gathering of the worldwide Lutheran family was determined to say that the apartheid system is so oppressive and so contrary to the Lutheran understanding of the unity of believers in Christ and the equality of the entire human family that it must be rejected as a matter of the faith itself:

> "On the basis of faith and in order to manifest the unity of the church," said the Sixth Assembly, "churches [should] publicly and unequivocally reject the existing apartheid system."

Apartheid is not simply a typical political question, about which Christians may hold differing opinions. It must be viewed from much the same theological perspective that the Confessing Church in Germany adopted in opposing the Hitler

regime 40 some years ago. Apartheid is to be rejected because it violates a central belief of the church as expressed in the Augsburg Confession. The immediate context for the LWF Sixth Assembly action was the separation of Black and White Lutherans in South Africa. As long as that cultural pattern (reinforced by South African law) was followed by the churches, an unbiblical criterion for unity — racial identity — was being used. And since that criterion goes beyond Augsburg's requirement (unity exists when there is agreement on the proclamation of the Word and the administration of the Sacraments), the racial test of unity is not valid and must be rejected.

Apartheid, therefore, presents the church with a "state of confession" because it attacks, in its impact on both church and society, the very heart of the church's confession of faith. By its 1980 convention action, the ALC is affirming the same position. It means that, for the ALC corporately, there can be no argument over whether apartheid is acceptable or reformable. It means that apartheid is viewed by us as simply and starkly in conflict with the biblical faith we hold. It is not a political ideology with which believers may compromise, but must be opposed by whatever means are at hand.

The ALC action of 1980 goes on to say that there are many legitimate strategies for opposing apartheid. One of them, withdrawing the church's investments from business corporations that are active in South Africa, received particular attention prior to and during the 1980 convention. The language adopted by delegates said two things about the strategy of disinvesting:

a. Withdrawing investments is "not a necessary consequence of a declaration of 'status confessionis.'" In other words, people who agree that apartheid is a central matter of the faith and must be opposed may *dis*agree on the strategy of disinvestment (or divestiture).

b. However, the ALC makes the judgment that, "at this moment in history in South Africa, divestiture is the most legitimate strategy in opposing apartheid and the most effective consequence of a declaration of 'status confessionis.'"

The 1980 convention action also supported a "call for withdrawal of investment by United States corporations from South Africa if in the judgment of the Board of Trustees that investment on balance strengthens the apartheid system."

The strategies in "Goals for Combating Apartheid" do not concentrate on corporate investment policy, either ALC withdrawal of holdings in companies or the withdrawal from South Africa of companies which are U.S.-based. Investment policy is, however, a part of the broader concern with economic factors, dealt with in Goal Six, and continues to be a part of the ALC's total strategy for dealing with apartheid.*

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* See "South Africa — Divestment," the May 1981 action by the ALC Board of Trustees in response to the 1980 ALC convention, page 20.